

No. 11-5064

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ORAL ARGUMENT NOT REQUESTED

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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CORA JEAN JECH, CHARLES TILLMAN, DUDLEY WHITEHORN, JOE HALL, JOANNA BARBARA, R.E. YARBROUGH, CODY TUCKER, and JOHN JOHNSON, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, KEN SALAZAR, Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, LARRY ECHO HAWK, Assistant Secretary -- Indian Affairs, and UNITED STATES OF AMERICA, Defendants-Appellees,

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On Appeal from the U.S. District Court for the Northern District of Oklahoma, Case No. 09-CV-828-TCK-TLW (Hon. Terrence C. Kern)

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**ANSWERING BRIEF OF THE UNITED STATES**

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**STATEMENT REGARDING PRIOR OR RELATED CASES**

This case has not previously been on appeal. Counsel is not aware of any related appeals.

## JURISDICTION

Eight individual members of the Osage Tribe of Indians (“Plaintiffs”) sought to invoke the district court’s jurisdiction pursuant to 28 U.S.C. 2201 (Declaratory Judgment Act), 25 U.S.C. 345, and 5 U.S.C. 702 (Administrative Procedure Act), to bring claims alleging that the United States Department of the Interior’s Bureau of Indian Affairs (“BIA”) failed to conduct Osage Tribal elections in 2006 in accordance with applicable statutory and regulatory requirements. On March 31, 2011, the district court entered an order and final judgment granting the BIA’s motion to dismiss the claims under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction because Plaintiffs failed to exhaust administrative remedies prior to bringing the action in district court. App. 384-385.<sup>1</sup> Plaintiffs timely filed a notice of appeal on April 28, 2011, within 60 days of entry of the final judgment. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction, pursuant to 28 U.S.C. 1291, to review the final judgment of the district court.

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<sup>1</sup> Record citations are to pages of the appendix (“App.”) filed by Plaintiffs-Appellants. Documents in the addendum to Plaintiffs-Appellants’ Opening Brief (Op. Br.) are cited as “Add. Att.” and documents in the addendum to this brief are cited as “US Add.”

## ISSUES PRESENTED

- I. Whether the district court properly dismissed the complaint, under Federal Rule of Civil Procedure 12(b)(1), for lack of subject matter jurisdiction, because Plaintiffs failed to exhaust administrative remedies pursuant to BIA administrative procedures (25 C.F.R. 2.6, 2.8) prior to filing the action in district court.
- II. Whether, in any event, dismissal is warranted under Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs' Complaint, which did not identify any final agency action subject to judicial review under Section 704 of the APA, failed to state a claim upon which relief could be granted.

## STATEMENT OF THE CASE

### A. Nature of the Case

In this case, eight individual members of the Osage Tribe of Indians filed suit in district court challenging the BIA's failure to oversee a tribal referendum and tribal election held in 2006, in which the Osage Tribe adopted a new Constitution and then elected tribal officials. As "headright owners" who own shares of the Osage Tribe's mineral estate, Plaintiffs claim that the new Constitution deprived them of rights they held as legal members of the Osage Tribe because it allowed non-headright owners to vote in elections of tribal officials who, in turn, have authority to make decisions regarding the mineral estate. In this lawsuit, Plaintiffs challenge the BIA's failure to take a more active role in conducting the voting procedures in 2006 and, thereafter, in recognizing the new Constitution and the tribal officials elected in the 2006 elections. Plaintiffs alleged that the BIA had: unlawfully failed to conduct the election for the Osage Nation

Constitution in March 2006; unlawfully failed to conduct the election for the Minerals Council in June 2006; and unlawfully recognized the Osage Nation Constitution as applicable to the reservation of mineral rights to members of the Osage Tribe. App. 33 (Compl. ¶ 59). Plaintiffs sought a declaratory judgment that they are entitled to certain rights under legislation enacted in 1906 (the Osage Allotment Act of June 28, 1906, 34 Stat. 539 (the “1906 Act”)), as clarified by the “Reaffirmation of Certain Rights of the Osage Tribe,” Pub. L. No. 108-431, 118 Stat. 2609 (Dec. 3, 2004) (“Reaffirmation Act”). Plaintiffs also sought an injunction requiring the BIA to conduct an election for a Principal Chief, Vice-Chief, and Minerals Council and to “take any and all action necessary to reinstate the Minerals Council and Mineral Estate as separate and independent from the Osage Nation.” App. 34-35. At root, Plaintiffs’ claims involve the impact of the 2004 Reaffirmation Act on certain provisions of the 1906 Act, as amended, and on BIA regulations adopted pursuant to the 1906 Act, which are set forth in 25 C.F.R. Part 90 (“Part 90”).

The BIA moved to dismiss the claims on the basis that the district court lacked subject matter jurisdiction because Plaintiffs failed to exhaust available administrative remedies prior to filing suit, failed to join an indispensable party

(the Osage Nation or Osage Tribe),<sup>2</sup> and raised an intra-tribal issue that is not appropriate for judicial review. Plaintiffs conceded that they failed to exhaust their administrative remedies. App. 326 (Magistrate Judge’s Report and Recommendation at 11). Most significantly, Plaintiffs did not seek an administrative appeal of any decision by the BIA. The Report and the Recommendation (“R&R”) of the Magistrate Judge, which the district court adopted, held that: (1) the only possible basis for subject matter jurisdiction would be pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. 701-706, and (2) there was no final agency action subject to review under the APA because Plaintiffs had failed to exhaust available administrative remedies, as is required by BIA regulations. See App. 322-333; see also App. 326 n.3. Accordingly, the district court granted the BIA’s motion to dismiss the claims for lack of subject matter jurisdiction. App. 384-385. Plaintiffs now appeal.

## **B. Statutory and Regulatory Framework**

### *1. The Administrative Procedure Act.*

Section 702 of the APA provides a waiver of federal sovereign immunity for a person suffering legal wrong because of agency action. 5 U.S.C. 702 (“action in a court of the United States \* \* \* stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of

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<sup>2</sup> The newly adopted Constitution changes the name of the Osage Tribe to the Osage Nation.

legal authority shall not be dismissed \* \* \* on the ground that it is against the United States”) (See US Add. 2). Section 704 specifies the type of “agency action” subject to judicial review: “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” 5 U.S.C. 704. Section 704 further provides that “agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of consideration, or, unless the agency otherwise requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.” 5 U.S.C. 704.

2. *The BIA’s Administrative Appeal Procedures.*

BIA regulations establish administrative appeal procedures that apply to all decisions made by officials of the BIA, except where a different administrative appeal procedure applies to a specific type of decision. 25 C.F.R. 2.3 (see US Add. 7). The regulations specify that “[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704.” 25 C.F.R. 2.6(a).

The regulations specify the procedure for seeking appeal from inaction of an official. First, the person whose interests are affected by the failure of an official to act, must:

- (1) Request in writing that the official take the action originally asked of him/her;
- (2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;
- (3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

25 C.F.R. 2.8(a). An official receiving such a request must either make a decision on the merits of the initial request within 10 days from receipt or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. Second, any decision, and any failure to make a decision under the relevant time frame, by the initial official "shall be appealable" to the next official in the process established by 25 C.F.R. Part 2. 25 C.F.R. 2.8(b).

The regulations state that "[a]n appellant must file a written notice of appeal in the office of the official whose decision is being appealed," 25 C.F.R. 2.9(a), and specify the format, content, timing, and service for the administrative appeal documents. 25 C.F.R. 2.9-2.21. The appellant must, *inter alia*, file a "statement of reasons," which must be "accompanied by or otherwise incorporate all supporting documents." 25 C.F.R. 2.10(a). The regulations also provide that "[w]hen the

appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.” 25 C.F.R. 2.9(b).

## STATEMENT OF FACTS

On January 5, 2010, Plaintiffs -- eight individuals who identify themselves as “individual legal member[s] of the Osage Tribe” (App. 16, Compl. ¶¶ 2-9), or “headright” owners entitled to receive distributions from the income and royalties derived from the Osage Tribe’s Mineral Estate (App. 18-19, Compl. ¶¶ 18-23) -- instituted this litigation against the BIA. In their Complaint, Plaintiffs asked the district court to reallocate voting rights, and effectively the balance of power, between headright owners and other members of the Osage Nation. More specifically, Plaintiffs alleged that only headright owners should be permitted to vote in elections and run for Principal Chief, Vice-Chief, and the Tribal Council.

### A. Historical Background

In 1872, Congress set aside approximately a million and a half acres as a reservation for the Osage Tribe of Indians. Act of June 5, 1872, ch. 310, 17 Stat. 228; see *McCurdy v. United States*, 246 U.S. 263, 265 (1918). In or about 1896, oil and gas were discovered on the reservation, App. 17 (Compl. ¶ 14), and the area turned out to be rich with deposits of oil, natural gas, coal, and other minerals. *McCurdy*, 246 U.S. at 265.

In 1906, Congress enacted the Osage Allotment Act, which provided for the allotment of the surface rights among the approximately 2000 tribal members and reserved the mineral rights in the allotted lands to the Osage Tribe (the “Mineral Estate”). *McCurdy*, 246 U.S. at 265; see Act of June 28, 1906, ch. 3572, 34 Stat. 539 (the “1906 Act”). The 1906 Act established a trust fund for proceeds from the sale of lands and income from the reserved Mineral Estate (“Osage Trust Fund”), and “provided for an equal division” of the Osage Trust Fund among the approximately 2000 tribal members. *McCurdy*, 246 U.S. at 265.

The 1906 Act also required the creation of a final roll of all tribal members. It limited membership in the Tribe, and the right to receive distributions from the Osage Trust Fund, to persons on the roll at the time of the 1906 Act and their children born before July 1, 1907 (“Allotted Members”). App. 17-18 (Compl. ¶¶ 16, 17). The right to receive distributions from the Osage Trust Fund is commonly known as a “headright.” App. 18 (Compl. ¶ 20). The 1906 Act, as amended, also provided that headrights pass to the heirs, devisees and assigns of the original Allotted Members. App. 19 (Compl. ¶ 22). As a result, some Osage tribal members now own either no headrights at all or small, fractionalized interests, while others may own multiple interests. *Id.*

Under the 1906 Act, only owners of headrights in the Mineral Estate are members of the Osage Tribe and are permitted to vote in tribal elections or to run

for tribal office. App. 21 (Compl. ¶ 26); *Logan v. Andrus*, 640 F.2d 269, 271 (10<sup>th</sup> Cir. 1981); Reaffirmation Act, 118 Stat. 2609 (Dec. 3, 2004) (Findings). As the *Logan* Court noted, at the time of enactment in 1906 all enrolled Osage Indians were headright owners, and thus all could vote. But, subsequently, including at the time *Logan* was decided in 1980, “many persons who assert that they are Osages do not have headrights and cannot vote for the Council.” *Id.* at 271; see also, *Fletcher v. United States*, 116 F.3d 1315, 1328-1329 (10<sup>th</sup> Cir. 1997) (holding that 1906 Act, as amended, prescribed the form of tribal government for the Osage Tribe and precluded adoption of the 1994 Constitution, which created a new form of tribal government and extended voting rights to non-headright owners).

Pursuant to the 1906 Act, the BIA adopted regulations, 25 C.F.R. Part 90 (“Part 90”) governing procedures for elections of the Osage Tribal Council and officers. Part 90 provides that only members of the Osage Tribe whose names appear on the quarterly annuity roll as of the last quarterly payment from the Osage Trust Fund immediately preceding the election will be entitled to hold office or vote for tribal officers. App. 21 (Compl. ¶ 26); 25 C.F.R. 90.21. In addition, Part 90 established certain responsibilities of the BIA (specifically, the Superintendent of the Osage Agency of the BIA) in administering elections of tribal officials. App. 21-22 (Compl. ¶ 27).

On December 3, 2004, Congress enacted the Reaffirmation Act, H.R. 2912. Publ. L. 108-431, 118 Stat. 2609 (Dec. 3, 2004) (Add. Att. 7). In the Reaffirmation Act, Congress affirmed the Osage Tribe's sovereign right to determine its own form of government and membership in the Tribe. App. 23 (Compl. ¶ 30). More specifically, the Reaffirmation Act clarified that the term "legal membership" [in the Osage Tribe] in Section 1 of the 1906 Act "means the persons eligible for allotments of Osage Reservation lands and a pro rata share of the Osage mineral estate as provided in th[e] [1906] Act, not membership in the Osage Tribe for all purposes." 118 Stat. 2609 (Add. Att. 7). The Act reaffirmed "the inherent sovereign right of the Osage Tribe to determine its own membership, provided that the rights of any person to Osage mineral estate shares are not diminished thereby" and "to determine its own form of government." *Ibid.* Regarding the BIA's role in elections and referenda, the Reaffirmation Act states: "At the request of the Osage Tribe, the Secretary of the Interior shall assist the Osage Tribe with conducting elections and referenda to implement this section." 118 Stat. 2609 (Add. Att. 7).

Both the Senate and House Reports state that the purpose of H.R. 2912 "is to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government." H. REP. 108-502, 108<sup>th</sup> Cong. 2d Sess. at 1 (May 19, 2004) (US Add. 17); S. REP. 108-343, 108<sup>th</sup> Cong. 2d Sess. at 1 (Sept.

15, 2004) (US Add. 21). The Reports further explain that the Osage Tribe is a federally recognized Tribe, but the 1906 Act “is unique among federal Indian laws in that it restricts the Osage Tribe from defining its own membership rules, and prescribes a particular form of government which the tribe cannot change. All other federally recognized Indian tribes generally have the sovereign right to make their own internal membership rules and to form suitable tribal governments.” H. REP. 108-502 at 1-2; see also S. REP. 108-343 at 1-2. The Reports further explained that H.R. 2912 “clarifies the 1906 Act and enables the Osage Tribe to craft its own membership and tribal government rules on the same footing as all other federally-recognized tribes” and provides that “*no one’s rights to shares in the mineral estate are diminished through the Osage Tribe’s new ability to determine its own membership.*” H. REP. 108-502 at 2 (emphasis added); S. REP. 108-343 at 2 (“H.R. 2912 clarifies the 1906 Act and re-affirms the right and authority of the tribe to craft its own membership, governance, and governmental rules on the same footing as all other Federally-recognized tribes” and provides “that no individual Osage’s rights to shares in the mineral estate are diminished by the exercise of the tribe’s re-affirmed authority to determine its own membership.”).

## **B. Proceedings Below**

On January 5, 2010, Plaintiffs filed a complaint against the BIA. Plaintiffs alleged that a series of events after the 2004 enactment of the Reaffirmation Act resulted in the ratification of a new Osage constitution in March 2006 and the election of tribal officials in June 2006, in which non-headright owners were permitted to vote. App. 26-29 (Compl. ¶¶ 38-46).<sup>3</sup> Plaintiffs asserted that it was unlawful to allow non-headright owners to vote to ratify a constitution, when their authority to vote rested on actions of a ten-member Government Reform Project Commission appointed by the Osage Tribe and/or on the new constitution itself. App. 24-26 (Compl. ¶¶ 33-36, 39-40).

Plaintiffs' complaint alleged that the new Osage constitution abolished the Osage Tribal Council and created, instead, a Minerals Council, which is charged with respecting and protecting the rights to income from mineral royalties and whose members are elected solely by headright owners. App. 27-28 (Compl. ¶ 43). Plaintiffs further averred that the Minerals Council is charged with approving mineral leases and other forms of development, but that its power to do so is now subject to a veto of the Principal Chief. Plaintiffs thus claimed that the scope of the Minerals Council's authority is impermissibly limited by the authority of the

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<sup>3</sup> In their opening brief on appeal, Plaintiffs indicate that they are challenging the BIA's role in elections held in 2010 (Op. Br. 7, 13, 15-16, 19, 21, 24). However, Plaintiffs original complaint was filed before those elections were held and Plaintiffs did not file an amended complaint.

Principal Chief and the Osage Nation Congress, who are elected by all Osage including non- headright owners. App. 28-29 (Compl. ¶ 44). Plaintiffs claimed that these events have resulted in the “disenfranchisement” of headright owners and “significantly diminished” the headright owners’ interests in the Mineral Estate. App. 24 (Compl. ¶ 32).

Plaintiffs’ Complaint did not identify any specific letter or letters of response from the BIA to a letter from one or more of the Plaintiffs as the agency action or inaction. Nor in their filings in the district court did Plaintiffs identify a letter in which any Plaintiff stated, as the BIA regulations require, that, “unless the official involved either takes the action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.” 25 C.F.R. 2.8(a)(3). See App. 329-330 (R&R at 14-15); App. 139-141 (letter from Plaintiff Tillman, which does not contain the requisite language). Plaintiffs’ Complaint also did not allege that they had filed an administrative appeal pursuant to BIA regulations, and in the district court Plaintiffs conceded that they had not done so. App. 326 (R&R at 11) (“Plaintiffs do not dispute that they have not exhausted their administrative remedies. Dkt. # 19 at 9.”); App. 329 (R&R at 14) (“Plaintiffs do not claim to have taken any other steps in the administrative process,” beyond the submission of an initial letter from Mr. Tillman).

Plaintiffs' Complaint included two counts. In Count 1, Plaintiffs sought a judicial declaration of their rights under the Reaffirmation Act and 1906 Act, including the alleged "inalienable right": to restrict voting for a Tribal Council, Principal Chief, and Vice-Chief, to owners of headrights; to have the "value of a ballot" be "directly proportional to the amount of the headright" because it "is a fundamental and inalienable property right associated with the ownership of a headright"; and to have the BIA conduct elections pursuant to Part 90. App. 32-33 (Compl. ¶ 56). In Count II, Plaintiffs sought a mandatory injunction requiring the BIA to conduct elections for the Principal Chief, Vice-Chief, and Minerals Council in accordance with 25 C.F.R. Part 90, and directing the BIA to "take any and all action necessary to reinstate the Minerals Council and Mineral Estate as separate and independent from the Osage Nation. App. 33-34 (Compl. ¶ 60).

The BIA moved to dismiss the claims under Rules 12(b)(1), 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure. App. 74. Magistrate Judge T. Lane Wilson conducted a hearing on whether Plaintiffs were required to exhaust available administrative remedies. App. 386-435. The Magistrate issued his Report and Recommendation on February 28, 2011, determining that there was no subject matter jurisdiction because Plaintiffs failed to exhaust available administrative remedies, and therefore there was no final agency action subject to judicial review under the APA. App. 316-334. The Magistrate ruled that the APA

was the sole basis on which jurisdiction over the claims might have rested, rejecting Plaintiffs' arguments that the Declaratory Judgment Act, 28 U.S.C. 2201, and/or 25 U.S.C. 345, provided a waiver of sovereign immunity and basis for jurisdiction. App. 326 n.3. The Magistrate deemed all other issues moot. App. 333. Plaintiffs objected to the Report and Recommendation on March 14, 2011. App. 335. By order March 31, 2011, the district court (Honorable Judge Terence Kern) affirmed and adopted the Magistrate's Report and Recommendation and entered a judgment of dismissal. App. 384-385.

## **SUMMARY OF ARGUMENT**

I. The district court properly dismissed the claims for lack of jurisdiction. Because Plaintiffs have not challenged a final agency action as defined in the BIA regulation 25 C.F.R. 2.6(a) and APA Section 704, Plaintiffs' claims do not fall within the limited waiver of sovereign immunity provided by the APA. In addition, the claims are not ripe for judicial review. The BIA's regulations set forth procedures for seeking administrative appeal of agency action and agency inaction. 25 C.F.R. Part 2. Those regulations, which Plaintiffs have not challenged, expressly provide that no decision that is subject to appeal to a superior authority in the Department shall be considered final agency action subject to judicial review under 704 of the APA. 25 C.F.R. 2.6(a). Plaintiffs concede that

they failed to comply with the administrative exhaustion procedures set forth in 25 C.F.R. Part 2.

Plaintiffs' Complaint did not identify any specific letter or letters as the alleged final decision of the agency, and the letters on which Plaintiffs focus has changed in the course of the litigation. On appeal, Plaintiffs attempt to rely on several letters, none of which satisfy the exhaustion requirements (and only one of which is a response from the agency to a letter from one of the Plaintiffs), to establish an alleged final agency policy. The assembling of several letters on a topic does not satisfy the exhaustion requirements set forth in the BIA's regulations. Nor does a letter from the Assistant Secretary to a non-plaintiff, which does not address in detail any of the issues Plaintiffs seek to raise in this case, constitute final agency action subject to judicial review. Indeed, the letter states, contrary to Plaintiffs' contentions, that the BIA *did* participate in the 2006 elections at the request of the Tribe. Thus, even if Plaintiffs could base an APA action on a letter sent to a non-party, the Assistant Secretary's letter does not constitute the consummation of agency decisionmaking on the issues Plaintiffs seek to raise here.

Contrary to Plaintiffs' assertions (Op. Br. 19-22), the BIA's alleged inaction relating to the 2006 elections was not "final agency action" subject to judicial review "when rendered." Like challenges to the various agency letters, Plaintiffs'

challenges to the BIA's role in the 2006 election are not justiciable because Plaintiffs failed to exhaust administrative remedies pursuant to the BIA regulations which expressly require administrative appeal of *agency inaction* to superior authority within the Department, 25 C.F.R. 2.8, before a decision "shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704." See 25 C.F.R. 2.6(a); see also 25 C.F.R. 2.8, 2.9. The court therefore lacked subject matter jurisdiction over such claims under Section 704 and, in any event, the claims were not ripe for review. See *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10<sup>th</sup> Cir. 1994) (holding that plaintiffs must exhaust administrative remedies pursuant to 25 C.F.R. 2.8 before seeking judicial review of agency inaction).

Nor have Plaintiffs demonstrated that seeking administrative review would be futile. The issues they raise are questions of first impression. Even where an agency has previously taken a position in federal court that is contrary to the plaintiff's interests, which the agency had not done here, this Court has found the futility exception to the exhaustion requirement not satisfied. *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 433 (10<sup>th</sup> Cir. 2011) (*en banc*). To the contrary, requiring exhaustion of administrative remedies would well-serve the purposes that underlie the requirement by allowing the agency to develop (or even change) its position (possibly obviating the need for judicial review) and to develop an

administrative record that will illuminate the facts, circumstances, and rationale for the specific agency actions at issue. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1236-1238 (10<sup>th</sup> Cir. 2005) (describing important purposes served by requiring exhaustion of administrative remedies).

II. Dismissal of Plaintiffs' claims under Rule 12(b)(6) for failure to state a claim likewise is warranted. The Complaint does not identify any final agency action that is subject to review under Section 704 of the APA because a BIA decision, even BIA inaction, is final only when it is not subject to review by a superior authority. 25 C.F.R. 2.6, 2.8. For the same reasons that this Court upheld dismissal of claims challenging BIA inaction for failure to state a claim in *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 924-925 (10<sup>th</sup> Cir. 1994), where plaintiffs had not exhausted administrative remedies, dismissal of Plaintiffs' claims is warranted here.

Plaintiffs also seek, on appeal, to challenge the BIA's alleged inaction in the 2010 elections. That issue is not before this Court because any such conduct occurred after Plaintiffs' Complaint was filed and therefore could not have been challenged in Plaintiffs' Complaint.

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' CLAIMS UNDER RULE 12(b)(1) BECAUSE PLAINTIFFS FAILED TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES.**

#### **A. Standard of Review**

In reviewing a dismissal under Rule 12(b)(1), this Court reviews *de novo* the district court's legal conclusions. *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182 (10<sup>th</sup> Cir. 2010). Where subject matter jurisdiction turns on a question of fact, this Court reviews the district court's factual findings for clear error. *Id.* Rule 12(b)(1) motions to dismiss usually take one of two forms: (1) facial attacks; and (2) factual attacks.

Under a facial attack, the movant merely challenges the sufficiency of the complaint, requiring the district court to accept the allegations in the complaint as true. *Paper, Allied-Industrial, Chem. and Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292 (10<sup>th</sup> Cir. 2005). In a factual attack, the movant goes beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends. In such a situation, the court "has wide discretion to allow documentary and even testimonial evidence under Rule 12(b)(1)." *Id.* "In such instances, a court's reference to evidence outside the pleadings does not convert the motion [to dismiss] to a Rule 56 motion [for summary judgment]." *Davis v. United States*, 343 F.3d 1282, 1296 (10<sup>th</sup> Cir. 2003)

(quoting *Holt v. U.S.*, 46 F.3d 1000, 1003 (10<sup>th</sup> Cir. 1995)).<sup>4</sup> The BIA agrees with Plaintiffs (Op. Br. 15-16) that the motion to dismiss should be analyzed as a factual attack on jurisdiction because the district court considered facts outside the Complaint in determining that it lacked subject matter jurisdiction.<sup>5</sup>

This Court is “free to affirm a district court’s decision on any grounds for which there is a record sufficient to support conclusions of law.” *See Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1054 (10<sup>th</sup> Cir. 1993).

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<sup>4</sup> When resolution of the jurisdictional question is intertwined with the merits of the case, a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion. *Cont’l Carbon*, 428 F.3d at 1292. The jurisdictional question concerning Plaintiffs’ failure to exhaust administrative remedies is not intertwined with the merits whether the BIA acted unlawfully by failing to play a larger role in the Tribe’s referendum, election and new Constitution, and Plaintiffs have not argued otherwise in their opening brief. *See Davis v. United States*, 343 F.3d 1282, 1296 (10<sup>th</sup> Cir. 2003) (substantive issue not intertwined with “whether a particular plaintiff has exhausted administrative remedies”); *Sizova v. Nat’l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325 (10<sup>th</sup> Cir. 2002) (exhaustion of administrative remedies is “simply not an aspect of [a] substantive claim”). Thus, the parties agree that the district court properly addressed the matter as a Rule 12(b)(1) motion to dismiss for lack of jurisdiction.

<sup>5</sup> Although the BIA’s motion to dismiss did not challenge the facts as alleged by the Plaintiffs (as Plaintiffs concede, see Op. Br. 16 n.6), the district court considered facts outside the Complaint in determining that Plaintiffs failed to exhaust available administrative remedies.

**B. Plaintiffs Have Not Challenged A Final Agency Action Subject To Review Under the APA.**

*1. Overview*

*a. No waiver of sovereign immunity.* Because Plaintiffs failed to exhaust administrative remedies pursuant to BIA regulations, there is no final agency action subject to review under the APA and the district court properly dismissed the claims for lack of subject matter jurisdiction. The jurisdiction of federal courts is limited, and ““there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof.”” *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10<sup>th</sup> Cir. 2005) (quoting *Marcus v. Kan. Dep’t of Revenue*, 170 F.3d 1305, 1309 (10<sup>th</sup> Cir. 1999)). Although 28 U.S.C. 1331 confers federal question jurisdiction, ““the United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.”” *Merida*, 428 F.3d at 919 (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). Consequently, district court jurisdiction cannot be based on § 1331, unless some other statute waives sovereign immunity. *Merida*, 428 F.3d at 919. The only waiver of sovereign immunity alleged by Plaintiffs here is the APA; but “the APA ‘contains a limited waiver of the United States’ sovereign immunity.’” *Id.* (quoting *City of Albuquerque v. U.S. Dep’t of the Interior*, 379 F.3d 901, 907 (10<sup>th</sup> Cir. 2004)).

The APA, 5 U.S.C. 701-706, does not authorize direct and immediate judicial review of every agency action. Section 702 provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. 702. The APA defines the term “agency action” to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. 551(13). But Section 704, which is captioned “actions reviewable,” imposes limitations on which agency actions are subject to judicial review. It provides that agency actions are subject to judicial review only in two instances: when agency action is “made reviewable by statute” or when it constitutes “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 549 (10<sup>th</sup> Cir. 2001). No other statute provides for judicial review of the claim presented here. Accordingly, the BIA action challenged by Plaintiffs is reviewable only if it constitutes “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704.

With regard to the meaning of “final agency action,” Section 704 specifies that agency action is not “final” for purposes of Section 704 if the agency “requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to

superior agency authority.” 5 U.S.C. 704.<sup>6</sup> As this Court explained in *Western Shoshone Business Council*, citing the Supreme Court case decided in the same year, “[i]n keeping with the recent Supreme Court decision discussing administrative exhaustion, *Darby v. Cisneros*, 509 U.S. 137 \* \* \* (1993), we note that the Department of the Interior decisions are not final for purposes of § 704 review if they are subject to appeal to a higher authority within the department. 25 C.F.R. § 2.6(a).” 1 F.3d at 1055 n.3. The BIA letters sent in response to letters from the Plaintiffs were subject to appeal to a higher authority and therefore were not final for purposes of Section 704. App. 330. Accordingly, there is no waiver of sovereign immunity and the district court properly dismissed the claims for lack of subject matter jurisdiction.

*b. No ripe claim.* In addition, the district court lacked jurisdiction because there is no ripe claim. Ripeness is a jurisdictional prerequisite. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 732-737 (1998). Where a claim is brought pursuant to the general “final agency action” provision in Section 704 of the APA, there is no ripe case or controversy absent some final agency action that is subject to judicial review.

In determining whether an agency decision is ripe for review, the Court “look[s] to four factors: ‘(1) whether the issues in the case are purely legal; (2)

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<sup>6</sup> Section 704 also states that a “preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action.” *Id.*

whether the agency action involved is “final agency action” within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704; (3) whether the action has or will have a direct and immediate impact upon the plaintiff and (4) whether the resolution of the issues will promote effective enforcement and administration by the agency.’” *HRI, Inc. v. EPA*, 198 F.3d 1224, 1236 (10<sup>th</sup> Cir. 2000) (quoting *Ash Creek Mining Co. v. Lujan*, 934 F.2d 240, 243 (10<sup>th</sup> Cir. 1991)). Even where the question is purely legal, which it is not here, review is inappropriate where there is no final agency action. See *HRI, Inc.*, 198 F.3d at 1236. As this Court explained in *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10<sup>th</sup> Cir. 2004), a failure to comply with the established BIA administrative procedures for appealing inaction of an official means that the claims are not ripe for judicial review. See also *Davis*, 343 F.3d at 1285, 1296 (holding district court correctly ruled that it lacked jurisdiction where plaintiffs, in responding to a Rule 12(b)(1) motion, failed to demonstrate that they had exhausted available BIA administrative remedies); *HRI, Inc.*, 198 F.3d at 1237 (challenge to EPA action not ripe for review where agency had not completed its decision-making process and had not developed an administrative record).

Here, because there is no final agency action, the claims were not within the scope of the APA’s waiver of sovereign immunity. Moreover, Plaintiffs claims are unripe, and therefore were properly dismissed for lack of jurisdiction.

2. *The letters from the BIA cited by Plaintiffs do not meet the exhaustion requirements of Section 704 and the BIA's regulations.*

Plaintiffs contend that because the BIA sent letters in response to several headright owners (only one of whom is a Plaintiff in this case), and those letters set forth “unwavering pronouncements of the BIA’s settled position” (Op. Br. 19), the administrative appeal requirements in 25 C.F.R. Part 2 are inapposite. This argument lacks merit.

a. The BIA regulations provide no such exception. The regulations state that “[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704.” 25 C.F.R. 2.6(a). Of the four letters referred to by Plaintiffs (Op. Br. 17-19) only one is responding to a Plaintiff-Appellant in this case. That is the letter dated March 19, 2007, from the Director of the BIA to Charles Tillman. App. 347-348.<sup>7</sup> The

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<sup>7</sup> As to the other three letters, two are addressed to Jenny Miller, who is not a plaintiff in this case. One of the letters to Ms. Miller is from the Assistant Secretary--Indian Affairs dated January 28, 2008, and another is from the Regional Director of the BIA dated February 28, 2008. App. 351-353. The letter from the Regional Director is subject to appeal to superior authority within the agency. Under BIA regulations, a decision of the Assistant Secretary is not appealable to a superior authority unless the decision expressly so provides. 25 C.F.R. 2.6(c). But the exhaustion requirements are not satisfied where a person seeks judicial review of a letter to a non-party. In such instance, a plaintiff has not structured *his participation* in the administrative process to allow the agency to give the issue meaningful consideration. See generally, *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10<sup>th</sup> Cir. 2011) (*en banc*) (Plaintiff must have structured

decision of the Director is subject to appeal to a superior authority in the Department. See 25 C.F.R. 2.4(e); *Shoshone-Paiute Tribes of the Duck Valley Reservation v. Director, BIA*, 39 IBIA 103, 103-104 (2003) (IBIA has jurisdiction to review decisions of Director of the BIA) (US Add. 26-27).<sup>8</sup> Plaintiffs concede that Mr. Tillman took no other step in the administrative process aside from sending the letter dated December 21, 2006.

Under Plaintiffs' theory, the BIA's administrative appeal procedures could be readily circumvented whenever a party collects and submits to the district court several letters that include a similar substantive response to the one the party received. Obviously, when an action by an agency is of public concern, the agency commonly will receive and respond to multiple letters regarding the matter. Plaintiffs' construct would render the exhaustion requirements, set forth in Section 704 of the APA and in the BIA's regulations, essentially meaningless and frustrate

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participation in administrative process to allow agency to give issue meaningful consideration, and to rectify the alleged violation). Moreover, as explained *infra* at 29-30, the letter to Ms. Miller from the Assistant Secretary does not constitute final agency action as to the issues raised by Plaintiffs, which it does not address in detail. The fourth letter, dated February 12, 2010, from the Director of the BIA to John Mashunkashev (see Op. Br. at 18-19; App. 354-355), who is not a party in this case, also is appealable to superior authority within the Department and therefore does not constitute final agency action subject to judicial review.

<sup>8</sup> Some positions described in Interior's appeal regulations have been reorganized and given new titles. Such is the case with the Director of the BIA. *Shoshone-Paiute Tribes of the Duck Valley Reservation*, 39 IBIA 103 (2003).

the important functions that the administrative exhaustion requirement is intended to serve.

b. Exhaustion is “not some arbitrary hurdle” to make it difficult to sue. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1237 (10<sup>th</sup> Cir. 2005). Rather, “[i]t serves ‘the twin purposes of protecting administrative agency authority and promoting judicial efficiency.’ *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). By giving the agency a chance to correct its own errors, administrative review often obviates the need for litigation.” *Simmat*, 413 F.3d at 1237. The exhaustion requirement also allows the agency to give a definitive answer and reasoned explanation for its decision and to develop an administrative record for its final decision. *Simmat*, 413 F.3d at 1238; *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10<sup>th</sup> Cir. 2001) (“exhaustion ‘may produce a useful record for subsequent judicial consideration, especially in a complex or technically factual context.’”) (quoting *McCarthy*, 503 U.S. at 145).

Had Plaintiffs pursued an administrative appeal of any letter from the BIA, there would necessarily be a statement of reasons for the appeal (to which Interior would have responded) and all supporting documents relating to the appeal, which Plaintiffs would have needed to file pursuant to 25 C.F.R. 2.10. But, as the Magistrate’s Report and Recommendation explains (App. 329-330), because none of the Plaintiffs pursued an administrative appeal, the agency had no opportunity to

reach a definitive decision and, in light of specific issues raised in an appeal, to correct its own errors (if any) and provide a thorough explanation for the decision. Nor is there a developed administrative record in this case, as is evident from Plaintiffs' piecemeal submission of letters in the district court. See App. 330 n.5.

Moreover, exhaustion "concerns apply with particular force" here, where the challenge involves issues of first impression and complex matters within the agency's discretion and special expertise, namely, the interplay between the 2004 Reaffirmation Act, the 1906 Act, and 25 C.F.R. Part 90 ("Election of Officers of the Osage Tribe"). *Shawnee Indians*, 253 F.3d at 550 ("[e]xhaustion concerns apply with particular force when the action under review involves" agency discretion or special expertise). The district court properly declined to address these new and complex issues where Plaintiffs had failed to give the agency an opportunity to resolve them in the first instance.

c. It is a "well-known axiom of administrative law that if a [party] wishes to preserve an issue" for review by the federal courts, "he must first raise it in the proper administrative forum." *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 783 (10<sup>th</sup> Cir. 2006) (quoting *Barron v. Ashcroft*, 358 F.3d 674, 677 (9<sup>th</sup> Cir. 2004)); *Wilson v. Hodel*, 758 F.2d 1369, 1372 (10<sup>th</sup> Cir.1985) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative

decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice.”) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). As this Court explained in *Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 430 (10<sup>th</sup> Cir. 2011) (*en banc*), to satisfy the exhaustion requirement in the statute and regulations concerning the Forest Service’s action:

[P]laintiffs generally must “‘structure their participation so that it alerts the agency to the parties’ position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” *Forest Guardians v. U.S. Forest Serv.*, 495 F.3d 1162, 1170 (10<sup>th</sup> Cir. 2007) (quoting *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004)) (internal quotation marks omitted). “Claims not properly raised before an agency are waived, unless the problems underlying the claim are ‘obvious’ or otherwise brought to the agency’s attention.” *Id.* (citation omitted). The claim must be presented “in sufficient detail to allow the agency to rectify the alleged violation.” *Id.*; see also *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3d Cir.1999) “[T]he claims raised at the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had the opportunity to consider and decide, the same claims now raised in federal court.”).

Plaintiffs have not accorded the agency that opportunity here. Even if Plaintiffs could rely on the letter of January 28, 2008, from the Assistant Secretary–Indian Affairs, which responds to a letter by non-plaintiff Ms. Miller to President George Bush, as the agency action for which they seek review, the exhaustion requirements are not met. The letter discusses the BIA’s role in the Osage elections in a general fashion. The letter from the Assistant Secretary states that “[a]t the request of the Osage Nation, the BIA, Eastern Oklahoma Region,

provided technical assistance and advice pursuant to Section 1(b)(3) of the [Reaffirmation] Act to the elected Tribal leadership regarding conduct of an election to implement the Act.” App. 351. But Plaintiffs raise specific claims regarding some further role they believe that the BIA should have taken in conducting the elections. Plaintiffs have not demonstrated that those issues were presented to the Assistant Secretary by Ms. Miller in sufficient detail to assure the court that the agency had the opportunity to consider and decide the issue. Nor have they shown that other issues they seek to have the district court resolve were presented to the Assistant Secretary in appropriate detail.

Plaintiffs cite no controlling authority to support the argument that the agency letters are final agency action in the absence of an administrative appeal. Nor do the two cases from other jurisdictions on which Plaintiffs rely (Op. Br. at 17-18) support judicial review absent the satisfaction of exhaustion requirements. In *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45 (D.C. Cir. 2000), the Environmental Protection Agency agreed that its position was final (*id.* at 48) and there was no issue regarding the exhaustion of administrative remedies. That case therefore is inapposite. In *Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122 (D.D.C. 2002), the district court’s decision does not suggest that every letter to a party constitutes final agency action; nor does its decision bind this Court in any event. The district court in *Seminole Nation* parsed which issues were finally

resolved in letters from the Assistant Secretary to the plaintiff Tribe, and which issues were not. *Id.* at 130, 140-141. The BIA does not dispute that a letter from the Assistant Secretary can be a final agency action; the BIA regulations expressly so provide. See 25 C.F.R. 2.6(c). But Plaintiffs have not identified any letter from the Assistant Secretary (much less one addressed to them) that addresses their specific claims regarding the BIA's alleged duty to take a greater role in supervising the elections. Indeed, in part because Plaintiffs did not seek administrative review – and also because Plaintiffs' Complaint does not identify any specific agency action or inaction that they are challenging – the precise scope of Plaintiffs' claims remains unclear to the BIA. The BIA's administrative appeal process is designed to clarify the precise nature of a party's concerns, and to allow the BIA to consider and respond to them.

*3. The BIA's challenged inactions, in allegedly failing to conduct the 2006 elections, are not subject to judicial review absent compliance with the exhaustion requirements.*

Plaintiffs argue that the “BIA's failure to administer the 2006 and 2010 Elections for the Mineral Estate necessarily represents the consummation of the BIA's decisionmaking process” and otherwise meets the finality requirements of Section 704. *Op. Br.* at 21-22. This argument is meritless.

First, Plaintiffs did not challenge the 2010 election in their Complaint (which was filed before that election). Nor did Plaintiffs seek to amend their

Complaint to add any claims relating to the 2010 election. Therefore, issues relating to the 2010 election are not presented in this case. *Callahan v. Poppell*, 471 F.3d 1155, 1161 (10<sup>th</sup> Cir. 2006) (plaintiff was barred from raising on appeal a claim not included in the complaint).

Second, the BIA's inaction with regard to the 2006 elections is not final agency action merely because Plaintiffs assert that it represents the consummation of agency decisionmaking. Pursuant to 25 C.F.R. 2.6(a), "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to review under 5 U.S.C. 704." The BIA regulations expressly provide that an official's *inaction* is subject to appeal to superior authority in the Department, and proscribe the manner for obtaining a final decision concerning agency inaction. 25 C.F.R. 2.8. The Magistrate's Recommendation and Report correctly determined (App. 330) that "the agency's alleged inaction would have provided plaintiffs with a right to seek further review from the next agency official identified in the regulations. \* \* \* Because the decision at issue was 'subject to appeal to a superior authority,' and because plaintiffs failed to pursue that appeal, the decision is not a final decision and plaintiffs have not exhausted their administrative remedies."

The cases cited by Plaintiffs (Op. Br. at 22) do not support judicial review under the APA absent exhaustion of administrative remedies in matters involving tribal elections or recognition of tribal officials. The cases (which are not controlling precedent in any event) involved letters from the Secretary and the Assistant Secretary. See *Vann v. Kempthorne*, 467 F.Supp.2d 56, 64, 71 (D.D.C. 2006) (challenge to letter from Secretary of the Interior dated July 25, 2003); *Seminole Nation*, 223 F.Supp. at 129, 142 (challenge to letter from the Assistant Secretary dated April 24, 2002). Under BIA regulations, such letters are not “subject to appeal to a superior authority” (unless the Assistant Secretary’s letter expressly so states). 25 C.F.R. 2.6. Thus, there was no question in either of those cases as to whether the party failed to meet exhaustion requirements, which was the basis for dismissal here. The question in those cases was whether the letters of the Secretary and Assistant Secretary – which were not subject to further administrative review -- constituted a “preliminary” or “intermediate” agency action (which is not subject to direct judicial review under Section 704), or a “final agency action” (which is subject to direct judicial review). Those cases simply illustrate that satisfaction of exhaustion requirements does not necessarily mean that an agency action is final for purposes of Section 704.

Thus, as a general matter, no decision by Interior that is subject to appeal to a superior authority constitutes action subject to judicial review under Section 704;

but *not every* decision by Interior that cannot be appealed to a superior authority constitutes a final agency action, under 5 U.S.C. 704. To be subject to review under Section 704, as well as satisfying the exhaustion requirements, the BIA action must be “[an] action for which there is no other adequate remedy in a court” – and not, for example, just a “preliminary, procedural, or intermediate agency action,” which are “not directly reviewable.” 5 U.S.C. 704; *see, e.g., Seminole Nation*, 223 F.Supp.2d at 142 (Assistant Secretary’s letter of April 24, 2002, “clearly expresses the Department’s desire to continue ‘to discuss with all parties’ potential methods of ‘resolving all remaining issues’” – and “did not constitute final agency action concerning the recognition of the [Seminole Nation’s] General Council”). Neither *Vann* nor *Seminole* provide any guidance regarding exhaustion of administrative remedies, which is at issue here. To the extent that Plaintiffs challenge the BIA’s failure to play any additional or greater role in the 2006 elections, that is a challenge to agency inaction that is not subject to judicial review until the administrative appeal procedures in 25 C.F.R. Part 2 have been satisfied.

*4. The challenged agency action does not fall within an exception to the exhaustion requirements.*

Plaintiffs suggest two reasons that the Court should not require exhaustion here: an alleged inadequacy in the BIA’s appeal procedures and futility in pursuing administrative review. Neither argument has merit, as the Magistrate Judge correctly found, and the district court properly affirmed.

a. Plaintiffs argue (Op. Br. at 22-24) that exhaustion of administrative remedies is not required here because the agency's exhaustion procedures are inadequate. Plaintiffs, citing *Darby v. Cisneros*, 509 U.S. 137, 154 (1993) assert that any appeal procedures must provide that the initial decision be "inoperative" pending an administrative appeal. Op. Br. 22-23.<sup>9</sup> The BIA appeal procedures satisfy that requirement.

---

<sup>9</sup> In *Darby*, the Supreme Court considered "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the APA, where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review." 508 U.S. at 138. In *Darby*, the parties agreed that the challenged agency action was final and that no agency rule required exhaustion. *Id.* at 144 & n.9. The question, therefore, was whether Section 704, "by providing the conditions under which agency action becomes 'final for the purposes of' judicial review, limits the authority of courts to impose additional exhaustion requirements as a prerequisite to judicial review." *Id.* at 145. The Court stated that where the APA applies, "an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Id.* at 154. The Court in *Darby* held that, in an APA case, where no statute or regulation requires a party to pursue administrative remedies, courts are without authority to require parties to exhaust administrative procedures as a precondition of seeking judicial review. *Id.* at 144-145. This ruling should not be read too broadly, however. As the D.C. Circuit explained in *CSX Transportation, Inc. v. Surface Transportation Board*, 568 F.3d 236 (D.C. Cir. 2009), in *Darby*, the only question before the Supreme Court was whether agency action was "final" for purposes of judicial review. "Because *Darby* says nothing at all about other reasons courts might find certain claims barred, it leaves intact the general requirement that parties give the agency a chance to rule on all their objections." *Id.* at 247. "[N]othing in *Darby* permits parties to obtain judicial review of a claim they never gave the agency a chance to address." *Id.*

The BIA regulations provide that an agency decision is inoperative until the time for filing a notice of appeal has expired (*i.e.*, 30 days, 25 C.F.R. 2.9) and no notice of appeal has been filed (25 C.F.R. 2.6(b)). Had Plaintiffs filed an appeal, the regulations concerning an appeal to the Interior Board of Indian Appeals (“IBIA”) would have governed. *See Shoshone-Paiute Tribe*, 39 IBIA 103 (IBIA has jurisdiction over appeal from a decision of the BIA Director). Those regulations provide that a decision becomes effective “on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal.” See 43 C.F.R. 4.21(a)(2); see also 43 C.F.R. 4.21(a)(3) (decision or portion of decision from which a stay is not granted becomes effective immediately); 43 C.F.R. 4.21(b) (setting forth standards and procedures for obtaining a stay) (see US Add. 15).

Prior to seeking judicial review, Plaintiffs needed to file a notice of appeal and, if they were so inclined, to petition for a stay. While this Court has not directly addressed the issue of the effect of the stay requirement in 43 C.F.R. 4.21, the Court has repeatedly affirmed the dismissal of claims where plaintiffs failed to exhaust administrative remedies under 43 C.F.R. 4.21. *See Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 787 (10<sup>th</sup> Cir. 2006) (affirming district court’s dismissal of claim against the Bureau of Land Management (“BLM”))

where plaintiffs failed to exhaust administrative remedies under 43 C.F.R. 4.21). In *Western Shoshone*, where plaintiffs had exhausted administrative remedies under 25 C.F.R. Part 2 and 43 C.F.R. 4.21 by appealing to the IBIA, this Court stated that “[i]n keeping with the recent Supreme Court decision discussing administrative exhaustion, *Darby v. Cisneros*, 509 U.S. 137 (1993), we noted that the Department of the Interior decisions are not final for purposes of § 704 review if they are subject to appeal to a higher authority within the department. 25 C.F.R. § 2.6(a).” *Western Shoshone*, 1 F.3d at 1055 n.3. Similarly in *Coosewoon v. Meridian Oil Company*, 25 F.3d 920, 925 (10<sup>th</sup> Cir. 1994), this Court held that plaintiffs must exhaust administrative remedies pursuant to 25 C.F.R. 2.8 before seeking judicial review of agency inaction. Other circuits likewise have required exhaustion under Interior’s administrative appeal procedures prior to judicial review. *See, e.g., White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9<sup>th</sup> Cir. 1988).

Plaintiffs cite no case in which this Court has addressed the effect of the stay petition requirement on the availability of judicial review, and we have not found any. The Ninth Circuit has held that where Interior’s Appeals Board denies a petition for a stay under 43 C.F.R. 4.21, the agency decision is final and subject to judicial review. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1182 (9<sup>th</sup> Cir. 2000) (record of decision was final agency action where Appeals Board

denied a petition for a stay). Conversely, where the Interior Appeals Board granted a stay, the Ninth Circuit held that the agency's decision was not final and not subject to judicial review. *National Parks & Conservation Ass'n v. BLM*, 586 F.3d 735, 741 (9<sup>th</sup> Cir. 2009) (not final agency action where Board granted a stay). As the Ninth Circuit explained in *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 825 (9<sup>th</sup> Cir. 2002), under 43 C.F.R. 4.21, the aggrieved party must file not only an appeal but also a petition for a stay of the decision pending appeal. "If the agency grants the stay, then the decision is rendered inoperative pending the administrative appeal. If the agency does not grant the stay, then the aggrieved party may seek recourse in federal court without further pursuing available administrative remedies." *Idaho Watersheds*, 307 F.3d at 825. Indeed, the Second Circuit has required exhaustion of administrative remedies even where Interior denied a stay, because of the court's need for the agency's views and a developed record. See *Shenandoah v. U.S. Dep't of the Interior*, 159 F.3d 708, 712-713 (2<sup>nd</sup> Cir. 1998).<sup>10</sup>

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<sup>10</sup> In *Shenandoah*, the Second Circuit concluded that in "this unusual case," involving whether to recognize a tribal official as the Oneida Nation's representative, the "BIA has special expertise and extensive experience," and it is "appropriate to afford the Department an opportunity in the first instance to decide" the issue. *Id.* at 713. As the Court explained, "[e]ven if the BIA ultimately reaffirms Halbritter's right to represent the Nation, federal courts will have the benefit of a full record and a determination by an agency with special expertise over the issue." *Id.* A ripeness analysis likely would have led to the same result.

Plaintiffs cite no APA case in which a court of appeals or the Supreme Court has held that an agency's requirement that an appellant apply for a stay obviates a requirement to exhaust administrative remedies pursuant to Section 704 – and we have found none. Plaintiffs' reliance (Op. Br. 23) on *Oregon Natural Desert Ass'n v. Green*, 953 F.Supp. 1133 (D. Ore. 1997) is misplaced. In *Green*, the district court held that the mere requirement that a person must apply for a stay pending review under 43 C.F.R. 4.21, which vests discretion in the Board to grant or deny a stay pending review, obviates the need to appeal to the Board prior to seeking judicial review of the agency action. *Id.* at 1141-1142. But, as explained *supra* at 38, subsequent Ninth Circuit case law directly contravenes that holding in *Green*. Plaintiffs fail to address that authority. The reasoning of the Ninth Circuit and the Second Circuit, which recognize the importance of exhaustion of administrative remedies, supports affirmance of the district court's dismissal here, where Plaintiffs did not even seek to pursue an administrative appeal or apply for a stay pending appeal.

Furthermore, it is significant that the issues of rendering a decision inoperative are presented here in the context of a challenge to agency inaction – not a challenge to agency action. Plaintiffs cite no authority (and we have found none) which supports the contention that direct judicial review should be available where, as here, a party challenges agency inaction but has failed to comply with

administrative exhaustion requirements. Indeed, it is not evident how any requirement for *agency action* to be inoperative pending an administrative appeal of agency action would or could apply to a challenge to *agency inaction*. As the Magistrate Judge noted (App. 331-332), Plaintiffs did not explain what *inaction* they believe the BIA should make *inoperative*. They likewise have failed to elucidate that point in their opening brief to this Court. As the Magistrate Judge correctly stated, “the agency ‘action’ in this case is very different from the ‘action’ contemplated by the court” in *Green*, where plaintiffs sought to enjoin BLM from implementing a river management plan that would have allowed specific activities to take place. App. 331. Where a party is challenging agency inaction, making the inaction “inoperative” would require the lower-level decision maker to take some type of affirmative action while the higher-level decision maker is considering whether, and what (if any), agency action is appropriate. That proposition is especially untenable where, as here, the party complaining of agency inaction has not specified what action it believes the agency must take pending administrative review.

Plaintiffs have made vague assertions that the BIA should not recognize elected Osage tribal officials but Plaintiffs have not identified what “action” they believe BIA was obligated to take pending an appeal – assuming that Plaintiffs had complied with the requirements for the initial letter and with the requirements for

pursuing an administrative appeal of any decision (or lack thereof) on the initial letter. As this Court explained in *Wheeler v. U.S. Dep't of the Interior*, 811 F.2d 549, 552-553 (10<sup>th</sup> Cir. 1987), the federal government, in its dealings with Indian tribes, must respect the tribe's right to self-government. Even where the BIA is required to determine which tribal government to recognize, such "special situations should be resolved in favor of tribal self-determination." *Id.* at 553.

While the BIA, in some circumstances, may freeze funds it provides to a Tribe or refuse to recognize tribal officials, the BIA is not required to do so merely upon the request of a few tribal members, as Plaintiffs suggest. *See, e.g. Seminole Nation of Okla. v. Norton*, 223 F.Supp.2d 122, 138-140 (D.D.C. 2002) (discussing actions Secretary may take where existing tribal government is acting outside its authority, and contexts in which it is appropriate to do so).

In short, neither the text of the regulations nor governing case law support Plaintiffs' contention that no exhaustion of remedies is required where the challenge is to agency inaction. To the contrary, this Court in *Coosewoon v. Meridian Oil Co.*, 25 F.3d 920, 925 (10<sup>th</sup> Cir. 1994), held that plaintiffs must exhaust administrative remedies pursuant to 25 C.F.R. 2.8 before seeking judicial review of agency inaction. Accordingly, in *Coosewoon*, this Court affirmed the district court's dismissal of plaintiffs' claims. *Id.* The same result is warranted here.

b. Finally, Plaintiffs' argument that exhaustion of administrative remedies would be futile (Op. Br. at 25-27) is also wrong. "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Forest Guardians*, 641 F.3d at 433 (quoting same).

This Court has recognized that exhaustion is not required where administrative remedies would be futile. *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 724 (10<sup>th</sup> Cir. 1996). But even where an agency has already taken a position on an issue in federal court, such a "perceived stance" on an issue does not make exhaustion of administrative remedies futile. *See Forest Guardians*, 641 F.3d at 433; see also *Urban*, 89 F.3d at 725 (exhaustion of administrative remedies required even where challenge to agency's second decision was same as challenges to agency's first decision). Rather, this Court has found exhaustion futile when: the agency lacked the authority or ability to resolve the challenge; the issue is purely one of statutory interpretation; or the court would not benefit from allowing the agency to develop a full administrative record on the issue. *Forest Guardians*, 641 F.3d at 432-433. The facts here do not meet any of those circumstances.

Contrary to Plaintiffs' assertions (Op. Br. 25-26), this case is not one of pure statutory interpretation in which development of a full administrative record would provide no benefit. For example, Plaintiffs contend that the BIA failed to take the requisite role in the 2006 elections. But one of the letters on which Plaintiffs rely states that the BIA was involved in the 2006 elections. Thus, the question posed by Plaintiffs is not purely legal – but requires development of an administrative record regarding the role that the BIA did take in the election. Both because of the lack of an administrative record here, and because Plaintiffs' Complaint does not challenge any specific agency decision set forth in an identified letter or letters, it is unclear exactly what additional actions Plaintiffs believe the BIA was required to take.

Also lacking in this case is a developed explanation of the agency's interpretation of the impact of the Reaffirmation Act on the BIA Part 90 regulations or on various provisions of the 1906 Act. An agency's interpretation of the statute it administers and its own regulations are entitled to deference. But an important function of requiring administrative review is to allow the agency to develop (and correct) its interpretation in a specific context, in light of a focused challenge by affected parties. As the Magistrate Judge correctly noted, this Court "has recognized that '[a]gency review . . . prior to judicial consideration is desirable even where pure questions of law are concerned, in order to provide the

court with the benefit of the agency's considered interpretation of its enabling authority' and to 'preserve[] the opportunity for the agency to correct an ill-conceived regulation and moot the issue without judicial interference.'" App. 33 (R&R at 18, quoting *St. Regis Paper Co. v. Marshall*, 591 F.2d 612, 614 (10<sup>th</sup> Cir. 1979)). Thus, contrary to Plaintiffs' contentions, administrative review would be beneficial, and exhaustion would not be futile. Accordingly, Plaintiffs' claims were properly dismissed for lack of jurisdiction because Plaintiffs failed to exhaust administrative remedies. The claims, therefore, are nonjusticiable because there is no applicable waiver of sovereign immunity and, in any event, the claims are unripe.

**II. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND DISMISSAL IS WARRANTED UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).**

**A. Standard of Review**

This Court is "free to affirm a district court's decision on any grounds for which there is a record sufficient to support conclusions of law." *See Western Shoshone*, 1 F.3d at 1054; *see also Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (although district court erroneously dismissed the action pursuant to Rule 12(b)(1), the court of appeals "could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim" under Rule

12(b)(6)); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997) (same).

Under Federal Rule of Civil Procedure 12(b)(6), this Court considers *de novo* the sufficiency of a complaint, accepting as true all well-pleaded factual allegations. *Smith v. United States*, 561 F.3d 1090, 1097-1098 (10<sup>th</sup> Cir. 2009); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10<sup>th</sup> Cir. 2007) (noting that in *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court established a new inquiry for courts to use in reviewing a dismissal under Rule 12(b)(6), requiring a plaintiff to nudge his claim across the line from conceivable to plausible, and retiring the “no set of facts” standard). In evaluating dismissal under Rule 12(b)(6), courts may consider not only the complaint itself but also attached exhibits. *Smith*, 561 F.3d at 1098.

**B. Plaintiffs’ Complaint fails to identify any final agency action and therefore fails to state a claim under the APA.**

This Court can affirm the district court’s judgment on any ground. See *supra* at 20. Dismissal of the claims is warranted under Federal Rule of Civil Procedure 12(b)(6), as the BIA argued below (see App. 95, Memo in Support of Fed. Def. Mot. Dismiss at 14 n. 1), because Plaintiffs’ Complaint fails to identify any final agency action that is subject to judicial review under Section 704. In *Coosewoon*, 25 F.3d at 924-925, this Court affirmed dismissal of plaintiffs claims under Rule 12(b)(6) because plaintiffs had failed to exhaust administrative

remedies prior to bringing suit, under Section 704 of the APA, challenging BIA inaction. Here, as there (*Coosewoon*, 25 F.3d at 924), Plaintiffs concede that they had failed to exhaust administrative remedies. Here, as there, “Plaintiffs must exhaust this remedy before seeking judicial review” (*id.* at 925) and therefore have failed to state a claim under Section 704 of the APA.

## CONCLUSION

For the foregoing reasons, the district court's order dismissing Plaintiffs' claims should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH TYPE VOLUME LIMITATION**

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,408 words (as counted by word processing software).

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On November 17, 2011, the foregoing ANSWERING BRIEF OF THE UNITED STATES was filed with the Court's Appellate Case Management / Electronic Case Filing (CM/ECF) System, which will serve notice of such filing on the following:

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# **ADDENDUM**

**ADDENDUM TO APPELLEES UNITED STATES' ANSWERING BRIEF**

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    →→ § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by [sections 1738, 1739, 1743, and 1744 of title 12](#); subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by [section 551](#) of this title.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; [Pub.L. 103-272](#), § 5(a), July 5, 1994, 108 Stat. 1373; [Pub.L. 111-350](#), § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

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Title 5. Government Organization and Employees ([Refs & Annos](#))

[Part I.](#) The Agencies Generally

[Chapter 7.](#) Judicial Review ([Refs & Annos](#))

→→ **§ 702. Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; [Pub.L. 94-574](#), § 1, Oct. 21, 1976, 90 Stat. 2721.)

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[Chapter 7](#). Judicial Review ([Refs & Annos](#))

**→→ § 703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; [Pub.L. 94-574](#), § 1, Oct. 21, 1976, 90 Stat. 2721.)

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**→→ § 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)



(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

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            **→→ § 705. Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

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     [Part I](#). The Agencies Generally  
         [Chapter 7](#). Judicial Review ([Refs & Annos](#))  
            →→ § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to [sections 556](#) and [557](#) of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)

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any Area Director or Agency Superintendent.

[25 FR 3124, Apr. 12, 1960]

## PART 2—APPEALS FROM ADMINISTRATIVE ACTIONS

Sec.

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AUTHORITY: R.S. 463, 465; 5 U.S.C. 301, 25 U.S.C. 2, 9.

SOURCE: 54 FR 6480, Feb. 10, 1989, unless otherwise noted.

### § 2.1 Information collection.

In accordance with Office of Management and Budget regulations in 5 CFR 1320.3(c), approval of information collections contained in this regulation is not required.

### § 2.2 Definitions.

*Appeal* means a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request.

*Appellant* means any interested party who files an appeal under this part.

*Interested party* means any person whose interests could be adversely affected by a decision in an appeal.

*Legal holiday* means a Federal holiday as designated by the President or the Congress of the United States.

*Notice of appeal* means the written document sent to the official des-

ignated in this part, indicating that a decision is being appealed (see § 2.9).

*Person* includes any Indian or non-Indian individual, corporation, tribe or other organization.

*Statement of reasons* means a written document submitted by the appellant explaining why the decision being appealed is in error (see § 2.10).

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

### § 2.3 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.

(b) This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.

### § 2.4 Officials who may decide appeals.

The following officials may decide appeals:

(a) An Area Director, if the subject of appeal is a decision by a person under the authority of that Area Director.

(b) An Area Education Programs Administrator, Agency Superintendent for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs), if the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.

(c) The Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20 of this part.

(d) A Deputy to the Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20(c) of this part.

(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs other than the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).

**§ 2.5 Appeal bond.**

(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal.

(c) In those cases in which the official before whom an appeal is pending determines that a bond is necessary to protect the financial interests of an Indian or Indian tribe, that official may require the posting of a bond on his/her own initiative.

(d) Where the official before whom an appeal is pending requires a bond to be posted or denies a request that a bond be posted, he/she shall give notice of his/her decision pursuant to § 2.7.

**§ 2.6 Finality of decisions.**

(a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

(b) Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

(c) Decisions made by the Assistant Secretary—Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

**§ 2.7 Notice of administrative decision or action.**

(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

**§ 2.8 Appeal from inaction of official.**

(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

(1) Request in writing that the official take the action originally asked of him/her;

(2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;

(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the

§2.9

date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's inaction shall be appealable to the next official in the process established in this part.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.9 Notice of an appeal.

(a) An appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in §2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with §2.6(b).

(b) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(c) The notice of appeal shall:

- (1) Include name, address, and phone number of appellant.
- (2) Be clearly labeled or titled with the words "NOTICE OF APPEAL."
- (3) Have on the face of any envelope in which the notice is mailed or delivered, in addition to the address, the clearly visible words "NOTICE OF APPEAL."

(4) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

(5) If possible, attach either a copy of the notice of the administrative decision received under §2.7, or when an official has failed to make a decision or take any action, attach a copy of the appellant's request for a decision or action under §2.8 with a written statement that the official failed to make a decision or take any action or to establish a date by which a decision would be made upon the request.

(6) Certify that copies of the notice of appeal have been served on interested parties, as prescribed in §2.12(a).

§ 2.10 Statement of reasons.

(a) A statement of reasons shall be filed by the appellant in every appeal, and shall be accompanied by or otherwise incorporate all supporting documents.

(b) The statement of reasons may be included in or filed with the notice of appeal.

(c) If the statement of reasons is not filed with the notice of appeal, the appellant shall file a separate statement of reasons in the office of the official whose decision is being appealed within 30 days after the notice of appeal was filed in that office.

(d) The statement of reasons whether filed with the notice of appeal or filed separately should:

- (1) Be clearly labeled "STATEMENT OF REASONS".
- (2) Have on the face of any envelope in which the statement of reasons is mailed or delivered, in addition to the address, the clearly visible words "STATEMENT OF REASONS".

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.11 Answer of interested party.

(a) Any interested party wishing to participate in an appeal proceeding should file a written answer responding to the appellant's notice of appeal and statement of reasons. An answer should describe the party's interest.

(b) An answer shall state the party's position or response to the appeal in any manner the party deems appropriate and may be accompanied by or

otherwise incorporate supporting documents.

(c) An answer must be filed within 30 days after receipt of the statement of reasons by the person filing an answer.

(d) An answer and any supporting documents shall be filed in the office of the official before whom the appeal is pending as specified in §2.13.

(e) An answer should:

(1) Be clearly labelled or titled with the words "ANSWER OF INTERESTED PARTY."

(2) Have on the face of any envelope in which the answer is mailed or delivered, in addition to the address, the clearly visible words "ANSWER OF INTERESTED PARTY," and

(3) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

**§ 2.12 Service of appeal documents.**

(a) Persons filing documents in an appeal must serve copies of those documents on all other interested parties known to the person making the filing. A person serving a document either by mail or personal delivery must, at the time of filing the document, also file a written statement certifying service on each interested party, showing the document involved, the name and address of the party served, and the date of service.

(b) If an appeal is filed with the Interior Board of Indian Appeals, a copy of the notice of appeal shall also be sent to the Assistant Secretary—Indian Affairs. The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) If the appellant is an Indian or Indian tribe not represented by counsel, the official with whom the appeal is filed (i.e., official making the decision being appealed) shall, in the manner prescribed in this section, personally or by mail serve a copy of all appeal documents on the official who will decide the appeal and on each interested party known to the official making such service.

(d) Service of any document under this part shall be by personal delivery or by mail to the record address as specified in §2.14. Service on a tribe

shall be to the principal or designated tribal official or to the governing body.

(e) In all cases where a party is represented by an attorney in an appeal, service of any document on the attorney is service on the party represented. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney shall include the name of the party whom the attorney represents and indicate that service was made on the attorney representing that party.

(f) When an official deciding an appeal determines that there has not been service of a document affecting a person's interest, the official shall either serve the document on the person or direct the appropriate legal counsel to serve the document on the person and allow the person an opportunity to respond.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

**§ 2.13 Filing documents.**

(a) An appeal document is properly filed with an official of the Bureau of Indian Affairs:

(1) By personal delivery during regular business hours to the person designated to receive mail in the immediate office of the official, or

(2) By mail to the facility officially designated for receipt of mail addressed to the official; the document is considered filed by mail on the date that it is postmarked.

(b) Bureau of Indian Affairs offices receiving a misdirected appeal document shall forward the document to the proper office promptly. If a person delivers an appeal document to the wrong office or mails an appeal document to an incorrect address, no extension of time should be allowed because of the time necessary for a Bureau office to redirect the document to the correct address.

(c) Notwithstanding any other provision of this section, an official deciding an appeal shall allow late filing of a misdirected document, including a notice of appeal, where the official finds that the misdirection is the fault of the government.

**§ 2.14**

**§ 2.14 Record address.**

(a) Every interested party who files a document in connection with an appeal shall, when he/she files the document, also indicate his/her address. Thereafter, any change of address shall be promptly reported to the official with whom the previous address was filed. The most current address on file under this subsection shall be deemed the proper address for all purposes under this part.

(b) The successors in interest of a party shall also promptly inform the official specified in paragraph (a) of this section of their interest in the appeal and their address.

(c) An appellant or interested party failing to file an address or change of address as specified in this section may not object to lack of notice or service attributable to his/her failure to indicate a new address.

**§ 2.15 Computation of time.**

In computing any period of time prescribed or allowed in this part, calendar days shall be used. Computation shall not include the day on which a decision being appealed was made, service or notice was received, a document was filed, or other event occurred causing time to begin to run. Computation shall include the last day of the period, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

**§ 2.16 Extensions of time.**

An official to whom an appeal is made may, upon a showing of good cause by a party and with notice to all other parties, extend the period for filing or serving any document; *provided*, however, that no extension will be granted for filing a notice of appeal under § 2.9 of this part or serve by itself to extend any period specified by law or regulation other than in this part.

**§ 2.17 Summary dismissal.**

(a) An appeal under this part will be dismissed if the notice of appeal is not filed within the time specified in § 2.9(a).

(b) An appeal under this part may be subject to summary dismissal for the following causes:

(1) If after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents, or

(2) If the appellant has been required to post a bond and fails to do so.

**§ 2.18 Consolidation of appeals.**

Separate proceedings pending before one official under this part and involving common questions of law or fact may be consolidated by the official conducting such proceedings, pursuant to a motion by any party or on the initiative of the official.

**§ 2.19 Action by Area Directors and Education Programs officials on appeal.**

(a) Area Directors, Area Education Programs Administrators, Agency Superintendents for Education, Presidents of Post-Secondary Schools and the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired. The decision shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

(b) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

**§ 2.20 Action by the Assistant Secretary—Indian Affairs on appeal.**

(a) When a decision is appealed to the Interior Board of Indian Appeals, a copy of the notice of appeal shall be sent to the Assistant Secretary—Indian Affairs.

(b) The notice of appeal sent to the Interior Board of Indian Appeals shall

certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) In accordance with the provisions of § 4.332(b) of title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary—Indian Affairs shall have authority to decide to:

- (1) Issue a decision in the appeal, or
- (2) Assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs.

The Assistant Secretary—Indian Affairs will not consider petitions to exercise this authority. If the Assistant Secretary—Indian Affairs decides to issue a decision in the appeal or to assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs, he/she shall notify the Board of Indian Appeals, the deciding official, the appellant, and interested parties within 15 days of his/her receipt of a copy of the notice of appeal. Upon receipt of such notification, the Board of Indian Appeals shall transfer the appeal to the Assistant Secretary—Indian Affairs. The decision shall be signed by the Assistant Secretary—Indian Affairs or a Deputy to the Assistant Secretary—Indian Affairs within 60 days after all time for pleadings (including all extensions granted) has expired. If the decision is signed by the Assistant Secretary—Indian Affairs, it shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision. Except as otherwise provided in § 2.20(g), if the decision is signed by a Deputy to the Assistant Secretary—Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR part 4, subpart D.

(d) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

(e) If the Assistant Secretary—Indian Affairs or the Deputy to the Assistant Secretary—Indian Affairs to whom the authority to issue a decision has been

assigned pursuant to § 2.20(c) does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction subject to 43 CFR 4.337(b). A motion for Board decision under this section shall invest the Board with jurisdiction as of the date the motion is received by the Board.

(f) When the Board of Indian Appeals, in accordance with 43 CFR 4.337(b), refers an appeal containing one or more discretionary issues to the Assistant Secretary—Indian Affairs for further consideration, the Assistant Secretary—Indian Affairs shall take action on the appeal consistent with the procedures in this section.

(g) The Assistant Secretary—Indian Affairs shall render a written decision in an appeal from a decision of the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) within 60 days after all time for pleadings (including all extensions granted) has expired. A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record. The decision shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

#### **§ 2.21 Scope of review.**

(a) When a decision has been appealed, any information available to the reviewing official may be used in reaching a decision whether part of the record or not.

(b) When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided. The deciding official shall include in the record copies of documents or a description of the information used in arriving at the decision. Except where disclosure of the actual documents used may be prohibited by law, copies of the information shall be made

available to the parties upon request and at their expense.

## PART 5—PREFERENCE IN EMPLOYMENT

Sec.

5.1 Definitions.

5.2 Appointment actions.

5.3 Application procedure for preference eligibility.

5.4 Information collection.

AUTHORITY: 4 Stat. 737, 25 U.S.C. 43; 22 Stat. 88, 25 U.S.C. 46; 28 Stat. 313, 25 U.S.C. 44; 24 Stat. 389, 25 U.S.C. 348; and 48 Stat. 986, 25 U.S.C. 472 and 479.

### § 5.1 Definitions.

For purposes of making appointments to vacancies in all positions in the Bureau of Indian Affairs a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal Jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; and

(e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

[43 FR 2393, Jan. 17, 1978. Redesignated at 47 FR 13327, Mar. 30, 1982, as amended at 54 FR 283, Jan. 5, 1989]

### § 5.2 Appointment actions.

(a) Preference will be afforded a person meeting any one of the standards of § 5.1 whether the appointment involves initial hiring, reinstatement, transfer, reassignment or promotion.

(b) Preference eligibles may be given a Schedule A excepted appointment under Exception Number 213.3112(a)(7). However, if the individuals are within reach on a Civil Service Register, they may be given a competitive appointment.

[43 FR 2393, Jan. 17, 1978. Redesignated at 47 FR 13327, Mar. 30, 1982, as amended at 49 FR 12702, Mar. 30, 1984]

### § 5.3 Application procedure for preference eligibility.

(a) Proof of eligibility must be submitted with the person's application for a position.

(b) In order for a person to be considered a preference eligible according to the standards of § 5.1, they must submit proof of membership, descendancy or degree of Indian ancestry as indicated on rolls or records acceptable to the Secretary.

[43 FR 2393, Jan. 17, 1978. Redesignated at 47 FR 13327, Mar. 30, 1982]

### § 5.4 Information collection.

The Office of Management and Budget has informed the Department of the Interior that the information collection requirements contained in part 5 need not be reviewed by them under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

[54 FR 283, Jan. 5, 1989]

**§ 3.15**

**§ 3.15 Persons who may apprehend or cause to be arrested.**

All persons duly authorized by the Secretaries of Agriculture, Army and Interior may apprehend or cause to be arrested, as provided in the Act of February 6, 1905 (33 Stat. 700) any person or persons who appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity on lands under the supervision of the Secretaries of Agriculture, Army, and Interior, respectively.

**§ 3.16 Seizure.**

Any object of antiquity taken, or collection made, on lands owned or controlled by the United States, without a permit, as prescribed by the act and this part, or there taken or made, contrary to the terms of the permit, or contrary to the act and this part, may be seized wherever found and at any time, by the proper field officer or by any person duly authorized by the Secretary having jurisdiction, and disposed of as the Secretary shall determine, by deposit in the proper national depository or otherwise.

**§ 3.17 Preservation of collection.**

Every collection made under the authority of the act and of this part shall be preserved in the public museum designated in the permit and shall be accessible to the public. No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution, and then only to another public museum, where it shall be accessible to the public; and when any public museum, which is a depository of any collection made under the provisions of the act and this part, shall cease to exist, every such collection in such public museum shall thereupon revert to the national collections and be placed in the proper national depository.

**PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES**

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- 4.2 Membership of appeals boards; decisions, functions of Chief Judges.
- 4.3 Representation before appeals boards.
- 4.4 Public records; locations of field offices.
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- 4.101 Who may appeal.
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- 4.104 Preparation, organization, transmittal, and status of appeal file.
- 4.105 Dismissal for lack of jurisdiction.
- 4.106 Representation and appearances.
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- 4.110 Prehearing briefs.
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- 4.112 Submission without a hearing.
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- 4.114 Settling of the record.
- 4.115 Discovery—depositions.
- 4.116 Interrogatories to parties; inspection of documents; admission of facts.
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**HEARING PROCEDURE RULES**

- 4.118 Hearings—where and when held.
- 4.119 Notice of hearings.
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the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision, except a decision by the Board of Contract Appeals which is subject to the Contract Disputes Act of 1978.

(b) *The Director*. Except for cases or decisions subject to the Contract Disputes Act of 1978, the Director, pursuant to his delegated authority from the Secretary, may assume jurisdiction of any case before any board of the Office or review any decision of any board of the Office or direct reconsideration of any decision by any board of the Office.

(c) *Exercise of reserved power*. If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued.

[50 FR 43705, Oct. 29, 1985, as amended at 52 FR 46355, Dec. 7, 1987; 52 FR 47097, Dec. 11, 1987]

## Subpart B—General Rules Relating to Procedures and Practice

### § 4.20 Purpose.

In the interest of establishing and maintaining uniformity to the extent feasible, this subpart sets forth general rules applicable to all types of proceedings before the Hearings Division and the several Appeals Boards of the Office of Hearings and Appeals.

### § 4.21 General provisions.

(a) *Effect of decision pending appeal*. Except as otherwise provided by law or other pertinent regulation:

(1) A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effective immediately;

(2) A decision will become effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for a stay pending ap-

peal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal;

(3) A decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section.

(b) *Standards and procedures for obtaining a stay*. Except as otherwise provided by law or other pertinent regulation:

(1) A petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

(i) The relative harm to the parties if the stay is granted or denied,

(ii) The likelihood of the appellant's success on the merits;

(iii) The likelihood of immediate and irreparable harm if the stay is not granted, and

(iv) Whether the public interest favors granting the stay;

(2) The appellant requesting the stay bears the burden of proof to demonstrate that a stay should be granted;

(3) The appellant shall serve a copy of its notice of appeal and petition for a stay on each party named in the decision from which the appeal is taken, and on the Director or the Appeals Board to which the appeal is taken, at the same time such documents are served on the appropriate officer of the Department; any party, including the officer who made the decision being appealed, may file a response to the stay petition within 10 days after service; failure to file a response shall not result in a default on the question of whether a stay should be granted; service shall be made by delivering copies personally or by sending them by registered or certified mail, return receipt requested;

(4) The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 calendar days of the expiration of the time for filing a notice of appeal;

(c) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

(d) *Finality of decision.* No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned, and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies.

[36 FR 7186, Apr. 15, 1971, as amended at 58 FR 4942, Jan. 19, 1993]

#### § 4.22 Documents.

(a) *Filing of documents.* A document is filed in the Office where the filing is required only when the document is received in that office during the office hours when filing is permitted and the document is received by a person authorized to receive it.

(b) *Service generally.* A copy of each document filed in a proceeding before the Office of Hearings and Appeals must be served by the filing party on the other party or parties in the case, except as otherwise provided by § 4.31. In all cases where a party is represented by an attorney, such attorney will be recognized as fully controlling the case on behalf of his/her client, and

service of any document relating to the proceeding shall be made upon such attorney in addition to any other service specifically required by law or by order of a presiding official or an appeals board. Where a party is represented by more than one attorney, service upon one of the attorneys shall be sufficient.

(c) *Retention of documents.* All documents, books, records, papers, etc., received in evidence in a hearing or submitted for the record in any proceeding before the Office of Hearings and Appeals will be retained with the official record of the proceedings. However, the withdrawal of original documents may be permitted while the case is pending upon the submission of true copies in lieu thereof. When a decision has become final, an appeals board in its discretion may, upon request and after notice to the other party or parties, permit the withdrawal of original exhibits or any part thereof by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal. Transcripts of testimony and/or documents received or reviewed pursuant to § 4.31 of these rules shall be sealed against disclosure to unauthorized persons and retained with the official record, subject to the withdrawal and substitution provisions hereof.

(d) *Record address.* Every person who files a document for the record in connection with any proceeding before the Office of Hearings and Appeals shall at the time of his initial filing in the matter state his address. Thereafter he must promptly inform the office in which the matter is pending of any change in address, giving the docket or other appropriate numbers of all matters in which he has made such a filing. The successors of such person shall likewise promptly inform such office of their interest in the matters and state their addresses. If a person fails to furnish a record address as required herein, he will not be entitled to notice in connection with the proceedings.

(e) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time

108TH CONGRESS }  
2d Session } HOUSE OF REPRESENTATIVES { REPORT  
108-502

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TO REAFFIRM THE INHERENT SOVEREIGN RIGHTS OF  
THE OSAGE TRIBE TO DETERMINE ITS MEMBERSHIP  
AND FORM OF GOVERNMENT

\_\_\_\_\_  
MAY 19, 2004.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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Mr. POMBO, from the Committee on Resources,  
submitted the following

R E P O R T

[To accompany H.R. 2912]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 2912) to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 2912 is to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.

BACKGROUND AND NEED FOR LEGISLATION

H.R. 2912 affirms the right of the Osage Tribe to form its own membership rules and tribal government, provided that no one's rights to any shares in the mineral estate of the tribe's reservation are diminished.

The Osage Tribe is a federally recognized tribe with a nearly 1.5 million-acre reservation in northeast Oklahoma. In 1906, Congress enacted the Osage Allotment Act ("1906 Act"), which is unique among federal Indian laws in that it restricts the Osage Tribe from defining its own membership rules, and prescribes a particular form of government which the tribe cannot change. All other federally recognized Indian tribes generally have the sovereign right to

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make their own internal membership rules and to form suitable tribal governments.

In brief, the 1906 Act—

- Defined the legal membership of the tribe to consist of all living Osage Indians who were on the Secretary of the Interior's 1906 roll for the tribe, plus their children born before July 1, 1907;
- Allotted a certain amount of surface land in the Osage Reservation to the tribal members;
- Provided that the tribe retained all mineral rights to the entire reservation in undivided ownership; and
- Provided for the distribution of royalties from development of mineral resources to each of the enrollees; such shares in the royalties are called "headright shares."

Federal court decisions have interpreted the 1906 Act to mean that Congress took away the Osage Tribe's right to determine its own membership rules. The only ones who may be members of the Osage tribe and participate in the tribal government are those who are the lineal descendants of the original enrollees under the 1906 Act and have a headright share of the mineral revenues from the reservation.

As a result, the 1906 Act excludes many thousands of Osage persons from being members of the tribe because they do not have headright shares. Ironically, in the eyes of the federal government, such individuals (including full-blooded Osages) are not "Indians" because one must be a member of a federally recognized tribe to be an Indian. Those Osage people who are precluded from being members of the tribe under the terms of the 1906 Act are thus denied important services and benefits, such as Native American academic scholarships, and more importantly, a role in participating in the life and government of the tribe. Without clarifying the 1906 Act, the Osage Tribe is prevented from attaining the self-sufficiency and strength of all other tribes who have the sovereign right and freedom to form their own rules.

H.R. 2912 clarifies the 1906 Act and enables the Osage Tribe to craft its own membership and tribal government rules on the same footing as all other federally-recognized tribes. The bill provides that no one's rights to shares in the mineral estate are diminished through the Osage Tribe's new ability to determine its own membership. Significantly, in a hearing on this bill, a representative of an association of headright owners testified in support of the legislation. The bill additionally provides that the Secretary of the Interior shall assist the tribe in holding appropriate elections and referenda at the request of the tribe.

The full committee hearing on H.R. 2912 was held on the Osage Reservation on March 15, 2004, where testimony was received from the regional director of the Bureau of Indian Affairs, the tribal chief, a tribal councilman, a representative of the Osage Shareholders Association, and two young Osage Indians who are currently denied membership in the tribe because of the 1906 Act. All testified in support of the legislation.

#### COMMITTEE ACTION

H.R. 2912 was introduced on July 25, 2003, by Congressman Frank Lucas (R-OK). The bill was referred to the Committee on

Resources. On March 15, 2004, the full Committee held a hearing on the bill. On May 5, 2004, the Full Resources Committee met to consider the bill. No amendments were offered and the bill was ordered favorably reported to the House of Representatives by unanimous consent.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 17, 2004.*

Hon. RICHARD W. POMBO,  
*Chairman, Committee on Resources,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2912, a bill to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker.

Sincerely,

ELIZABETH ROBINSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*H.R. 2912—A bill to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government*

H.R. 2912 would enable the Osage Tribe to determine the tribe's membership roll and government rules in the same manner as other federally recognized tribes. In 1906, the Congress enacted the Osage Allotment Act that defined membership in the Osage Tribe. Under the act, Osage Indians may be legal members of the tribe and participate in the tribal government only if they are lineal descendants of the original enrollees under the 1906 act and own a share of the mineral revenues from the reservation. CBO estimates that implementing H.R. 2912 would have no effect on the federal budget because federal agencies currently provide services to all Osage Indians and do not restrict services to those considered to be members of the tribe under the Osage Allotment Act. Enacting H.R. 2912 would not affect revenues or direct spending.

S. 1423 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation would benefit the Osage Tribe.

The CBO staff contact for this estimate is Lanette J. Walker. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

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**Calendar No. 697**

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TO REAFFIRM THE INHERENT SOVEREIGN RIGHTS OF  
THE OSAGE TRIBE TO DETERMINE ITS MEMBERSHIP  
AND FORM OF GOVERNMENT

SEPTEMBER 15, 2004.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs,  
submitted the following

**R E P O R T**

[To accompany H.R. 2912]

The Committee on Indian Affairs, to which was referred the bill (H.R. 2912) to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government, having considered the same, reports favorably thereon without amendment and recommends that the bill (as amended) do pass.

**PURPOSE**

The purpose of H.R. 2912 is to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.

**BACKGROUND AND NEED FOR LEGISLATION**

H.R. 2912 affirms the right of the Osage Tribe (the “tribe”) to form its own membership rules and tribal government, provided that no rights to any shares in the mineral estate of the tribe’s reservation are diminished.

The tribe is a Federally recognized tribe with a nearly 1.5 million-acre reservation located in northeast Oklahoma. In 1906, Congress enacted the Osage Allotment Act (“1906 Act”), which is unique among Federal Indian laws in that it restricts the Osage Tribe from defining its own membership rules, and prescribes a particular form of government which the tribe cannot change without seeking amendment of Federal law.

All other Federally recognized Indian tribes in the nation generally have the sovereign right to make their own internal member-

ship rules and to form suitable tribal governments. In brief, the 1906 Act—

—Defined the legal membership of the tribe to consist of all living Osage Indians who were on the Secretary of the Interior’s 1906 roll for the tribe, plus their children born before July 1, 1907;

—Allotted a certain amount of surface land in the Osage Reservation to the tribal members;

—Provided that the tribe retained all mineral rights to the entire reservation in undivided ownership; and

—Provided for the distribution of royalties from the development of mineral resources to each of the enrollees, such shares in the royalties are called “headright shares.”

U.S. Federal court decisions have interpreted the 1906 Act to mean that Congress took away the tribe’s right to determine its own membership rules. The only individuals who may be members of the tribe and participate in the tribal government are those who are the lineal descendants of the original enrollees under the 1906 Act and who have a headright share of the mineral revenues from the reservation.

As a result, the 1906 Act excludes many thousands of Osage Indians from being members of the tribe because they do not have headright shares. Ironically, in the eyes of the Federal government, such individuals (including full-blooded Osages) are not “Indians” because one must be a member of a Federally-recognized tribe to be an Indian.

Those Osages who are precluded from being members of the tribe under the terms of the 1906 Act are thus denied important services and benefits, such as Native American academic scholarships, and more importantly, a role in participating in the life and government of the tribe.

Without clarifying the 1906 Act, the tribe is prevented from exercising its prerogatives as an Indian tribal government and individual Osages are prevented from the full enjoyment of their rights and privileges owing to their rightful membership in the Osage tribe.

H.R. 2912 clarifies the 1906 Act and re-affirms the right and authority of the tribe to craft its own membership, governance, and governmental rules on the same footing as all other Federally-recognized tribes. The bill provides that no individual Osage’s rights to shares in the mineral estate are diminished by the exercise of the tribe’s re-affirmed authority to determine its own membership.

The bill also directs the Secretary of the Interior to assist the tribe in holding appropriate elections and referenda at the request of the tribe.

#### LEGISLATIVE HISTORY

H.R. 2912 was introduced on July 25, 2003, by Congressman Frank Lucas (R-OK) and referred to the Committee on Resources. On March 15, 2004, that Committee held a hearing on the bill, and on May 5, 2004, the bill was favorably reported to the House of Representatives by unanimous consent. See H. Rpt. 108-502. On June 1, 2004, the House of Representatives passed the bill, and when it came to the Senate it was referred to the Committee on Indian Affairs.

On July 14, 2004, the Committee on Indian Affairs favorably reported H.R. 2912 to the Senate with recommendation that it do pass.

COMMITTEE RECOMMENDATION

The Senate Committee on Indian Affairs, in open business session on July 14, 2004, by a unanimous voice vote of a quorum present, considered the bill and ordered H.R. 2912, in the form of a substitute amendment, reported to the Senate with favorable recommendation that it be passed.

COST AND BUDGETARY CONCERNS

The costs estimate for H.R. 2912, as provided by the Congressional Budget Office, is set forth below.

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 20, 2004.*

Hon. BEN NIGHTHORSE CAMPBELL,  
*Chairman, Committee on Indian Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2912, an act to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mike Waters.

Sincerely,

ELIZABETH ROBINSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*H.R. 2912—An act to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government*

H.R. 2912 would enable the Osage Tribe to determine the tribe's membership roll and government rules in the same manner as other federally recognized tribes. In 1906, the Congress enacted the Osage Allotment Act that defined membership in the Osage Tribe. Under that act, Osage Indians may be legal members of the tribe and participate in the tribal government only if they are lineal descendants of the original enrollees under the 1906 act and own a share of the mineral revenues from the reservation. CBO estimates that implementing H.R. 2912 would have no effect on the federal budget because federal agencies currently provide services to all Osage Indians and do not restrict services to those considered to be members of the tribe under the Osage Allotment Act. Enacting H.R. 2912 would not affect revenues or direct spending.

H.R. 2912 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation would benefit the Osage Tribe.

On May 17, 2004, CBO transmitted a cost estimate for H.R. 2912, as ordered reported by the House Committee on Resources on

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May 5, 2004. The two versions of the legislation and the CBO cost estimates are identical.

The CBO staff contact for this estimate is Mike Waters. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### EXECUTIVE COMMUNICATIONS

The Committee has received no executive communications relating to H.R. 2912.

#### REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that the regulatory and paperwork impact of H.R. 2912 will be minimal.

#### CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that the enactment of H.R. 2912 will not effect any changes in existing law.

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INTERIOR BOARD OF INDIAN APPEALS

Shoshone-Paiute Tribes of the Duck Valley Reservation  
v. Director, Bureau of Indian Affairs

39 IBIA 103 (08/26/2003)



found that it has jurisdiction to review decisions issued by the person in the reorganized position. See, e.g., Henderson v. Portland Area Director, 16 IBIA 169, 174 n.8 (1988). However, if it did not have jurisdiction to review those decisions, the Board has found that it does not have jurisdiction to review decisions issued by a person in the reorganized position. See, e.g., Union Oil Co. v. Director, Farmington Indian Minerals Center, 35 IBIA 127 (2000).

In this case, the Board had jurisdiction to review decisions issued by both the Commissioner of Indian Affairs and by the Deputy Commissioner. The reorganization which changed the title of Deputy Commissioner to Director evidenced no intent to alter the established process for administrative review. Under these circumstances, the Board finds that it has jurisdiction in general to review decisions issued by the Director.

Therefore, the Director's decision should have included information about the right to appeal to the Board. See 25 C.F.R. § 2.7(c). In this instance, the failure to include that information constituted harmless error, because the Tribes filed a notice of appeal with the Assistant Secretary, who transmitted that notice of appeal to the Board so that it was received within the time period for filing a notice of appeal.

However, even though it has jurisdiction to review decisions issued by the Director in general, the Board's jurisdiction is limited in other ways. The Tribes seek review of a decision declining a request to waive the requirements of the NFPA 101 Life Safety Codes. Assuming for purposes of this order that the requirements can be waived, the decision as to whether or not they should be waived is discretionary, just as is a decision as to whether or not a regulation should be waived. See, e.g., Sanders v. Muskogee Area Director, 19 IBIA 213 (1991). Cf. Skye v. Aberdeen Area Director, 26 IBIA 169 (1994) (BIA lacks authority to waive a regulation if waiver would result in a violation of a statute). The Board lacks jurisdiction to review a decision based upon the exercise of discretion committed to BIA. 43 C.F.R. § 4.330(b)(2); Sanders. Under 43 C.F.R. § 4.337(b), it may dismiss such appeals or refer them to the Assistant Secretary for consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed, but dismissed for lack of jurisdiction to review a decision based upon the exercise of discretion. However, the matter is referred to the Assistant Secretary for review of the exercise of discretion by the Director, Bureau of Indian Affairs. 1/

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Kathleen R. Supernaw  
Acting Administrative Judge

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1/ Should it be the case that BIA cannot legally waive the NFPA 101 Life Safety Codes, the Assistant Secretary has inherent authority to reach that conclusion.